

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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LUIS FERNANDO MARTINEZ SEPULVEDA,

Petitioner,

-against-

MEMORANDUM & ORDER

UNITED STATES OF AMERICA,

98 Civ. 4367 (ILG)

Respondent.  
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GLASSER, United States District Judge:

The petitioner has filed a motion pursuant to 28 U.S.C. § 2255, to vacate, reduce or modify his sentence based on his claim of ineffective assistance of counsel at his sentencing. Specifically, he argues that his attorney failed to seek (1) a two-level downward departure pursuant to petitioner's stipulation for a judicial order of deportation and (2) a downward departure due to petitioner's personal, mental and family circumstances.

**BACKGROUND**

Petitioner, on October 5, 1996, was arrested by United States Customs Service agents for possession of heroin after arrival at John F. Kennedy International Airport. He was indicted on October 31, 1996 and charged with importing heroin into the United States in violation of 21 U.S.C. § 952 (a), and possessing with the intent to distribute heroin, in violation of 21 U.S.C. § 841 (a) (1).

Petitioner reached a plea agreement with the United States Attorneys Office ("the Office") that included a recommended one-level downward departure in exchange for which petitioner agreed to a judicial order of deportation. Prior to sentencing, petitioner's attorney,

Douglas G. Morris, in a letter dated February 17, 1997, moved for an additional downward departure based on three grounds: family circumstances, mental instability and tragic personal background. On March 7, 1997, Stuart Grossman was substituted as attorney for petitioner.

At sentencing on March 25, 1997, this Court accepted the government's recommendation of a one-level downward departure for petitioner's consent to the judicial order of deportation. However, this Court rejected Mr. Grossman's request for a further downward departure due to petitioner's three claims as stated in Mr. Morris' letter.

### **DISCUSSION**

The Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984) set forth the criteria necessary for a defendant to establish an ineffective assistance of counsel claim. First, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 688. Furthermore, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. The record and all of the evidence presented indicate that petitioner does not satisfy the Strickland test.

Petitioner first argues that his counsel's representation was ineffective because at sentencing his attorney failed to request a two-level, rather than a one-level, downward departure in exchange for stipulating to the court order of deportation. However, such a failure does not suggest that the representation provided fell below an "objective standard of reasonableness," particularly where, as here petitioner had earlier—prior to his sentencing—signed a plea agreement requiring the government to recommend a *one-level* downward departure. See Exh. C (Plea Agreement).

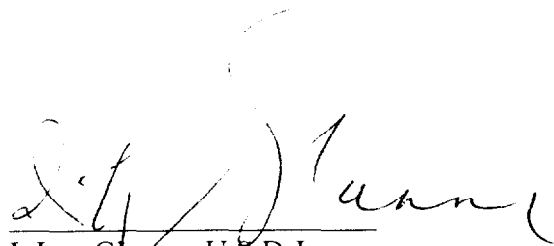
Moreover, petitioner cannot show that had his attorney requested a two-level departure “the result of the proceeding would have been different.” As a recent memorandum from the United States Attorneys Office of the Eastern and Southern Districts to judges in the Eastern and Southern Districts notes, that when a defendant stipulates in a plea agreement to be deported, the general practice of the courts in the Eastern District is to grant a one-level, rather than two-level, departure. See Exh. I at i. Indeed, this memorandum directs the courts to abandon this practice altogether. Other circuits have already done so. See United States v. Clase-Espinal, 115 F.3d 1054, 1057, (1st Cir. 1997) (holding that a defendant’s stipulation for deportation is “insufficient, as a matter of law, to warrant a downward departure”). Thus, it is evident that the first element of petitioner’s ineffective assistance claim does not satisfy the Strickland test.

The second element of petitioner’s claim is that at sentencing his attorney failed to request a further downward departure based on three factors: family circumstances, mental instability and tragic personal background. However, the record is clear that at sentencing Mr. Grossman referred to the letter that Mr. Morris, petitioner’s original attorney, sent to this Court documenting petitioner’s extraordinary circumstances: “I would ask the Court to consider downwardly departing based on all three of the factors that Mr. Morris highlighted in his letter. See Exh. G (Transcript of Sentencing Hearing) at 4. The record is proof that Mr. Grossman acted reasonably and properly at sentencing thereby rendering the second element of petitioner’s claim moot.

For the foregoing reasons, petitioner's 28 U.S.C. § 2255 motion is denied.

SO ORDERED.

Dated: Brooklyn, New York  
July ~~3~~<sup>4</sup>, 1998

  
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I. Leo Glasser, U.S.D.J.

Copies of the foregoing Memorandum and Order were this day sent to:

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